Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-937

JULIUS VARGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on October 18, 1979.

CITATION TO OPINIONS BELOW

There has been no opinion written in this matter either by the District Court for the Western District of Pennsylvania or by the Third Circuit Court of Appeals. However, the Appendix does include orders issued by the Third Circuit Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix A hereto, was made and entered on October 18, 1979. A Petition for Rehearing en banc was timely filed and denied by the Court of Appeals on November 16, 1979. A copy of that Order is appended hereto marked Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

THE QUESTIONS PRESENTED.

1. Can the Mail Fraud Statute (18 U.S.C.A. 1341) be used to extend Federal Jurisdiction in situations where the relationship between the alledged scheme or artifice and the use of the mails is brought about by intrisically innocent employment required mailings?

2. Can Rule 1006 of the Federal Rules of Evidence be used to admit a chart which not only summarized the contents of writings, recordings or photographs, but also included summaries of the testimony of various witnesses, thereby attacking the integrity of the juries traditional and historic functions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Statute involved is 18 U. S. C. A. § 1341 which provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or

> intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> As amended May 24, 1949, c. 139, § 34, 63 Stat.94.

STATEMENT OF THE CASE.

The petitioner was convicted on January 18, 1979, of Mail Fraud, and theft or embezzlement from employment and training funds arising out of his duties as the City Clerk for the City of Jeannette. The indictment relative to the above matter was issued in the Western District of Pennsylvania on August 23, 1978.

The indictment alledged and all proof at the time of trial, regarding the Mail Fraud Counts, centered around the procedure of the City of Jeannette whereby the City was entitled to reimbursement by certain insurance companies, for money paid to employees by the City during periods of illness or injury of the said employees. Mr. Vargo's duties included sending documentation to the insurance companies of the time lost by employees and the reasons thereof. The insurance company would, after receiving the reports from Mr. Vargo, send a check through the United States Mail for the amount covered by the said insurance policy. The scheme alledged was that once the checks were received, Mr. Vargo

would substitute the checks for cash in the Clerks Office and take the money.

During the trial the Government introduced into evidence, over defendants objection, a summary chart containing a summary of information surrounding each check that was alledgedly a part of the scheme. The summary included such information as the amount of the check, the date of issue and date of presentment, the name of the payor and name of the payee and other information physically present on the check itself. In addition, there was certain other matters included in the summary to which this petition is addressed. The summary indicated (1) whether or not the check had been reported by the City Clerk, which said determination was made by certain government witnesses (2) whether or not the payee, indicated on the stand, if he had signed the check (3) whether or not the amount of the check corresponded to amounts on other exhibits introduced and (4) whether ot not initials of assistant clerks appearing on particular checks, were in fact put on by the particular clerk, which said information was stated by certain witnesses during the trial. The basis for petitioners objection to this exhibit marked Government Exhibit 83, is that the summaries contained thereon are considerations that can only be made by the jury.

After defendants trial, appeal was made to the Third Circuit Court of Appeals, herein, the conviction was affirmed without an opinion of the court being written. A Petition for Rehearing was presented and denied, again with no opinion being written. To date, no opinion either by the District Court or Court of Appeals has been written and orders of the Court of Appeals are included in the Appendix.

REASONS FOR GRANTING THE WRIT.

I.

The United States Supreme Court has addressed the issue of the necessary nexus between the mailings and the scheme in several instances under the Mail Fraud Statute, and petitioner urges the Court that the case at hand presents the opportunity to further clarify the extension of Federal Jurisdiction by use of the United States interest in the use of the United States Mails. In United States v. Maze, 414 U.S. 395 (1974), the Court established certain considerations relative to the necessary relationship of the mailings and the Court through Mr. Justice Rehnquist stated:

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But, it did not do this; instead, it required that the use of the mails be "for the purpose of executing such scheme or artifice". 414 U.S. 395, 404.

The Court has been concerned through its various inquiries as to the effect that the decisions regarding the mail fraud statute would have on the strength of the statute keeping in mind the need for the financial security of our citizenry. However, as pointed out by Mr. Justice Rehnquist, by way of footnote, the statutes broad language maintains the statute as a strong weapon, but the Federal Government is not to engage in combat in situations purely of state interest and areas that Congress has intended to exclude by the restrictive language within the statute. See United States v. Maze, 414 U.S. 395, 406 (1974).

The petitioner respectfully contends that the Federal concerns in the case at hand and in many similar cases should not be extended into areas where adequate and specifically applicable state

statutes are operative. The case at hand presents the extension of Federal Jurisdiction by way of the mail fraud statute into an area where (1) the mailings were a necessary and required portion of petitioners employment (2) the scheme alledged, included both situations where the petitioner received mailings and where the material was hand carried to petitioner and (3) the scheme, specifically the substitutions of checks for cash and the taking of the cash, is too remote as to the mailings as indicated by the fact that the material actually received or sent through the mails was not the same physical material that was alledged taken into possession by the petitioner.

Wherefore, petitioner respectfully asserts that the issue regarding the extension of Federal Jurisdiction by use of the federal mail fraud statute is of such importance and significance and since the case at hand presents an opportunity to address these issues, that the Writ of Certiorari be granted.

II.

During the course of the trial, the Government introduced a summary chart containing a compiled list of the alledgedly substituted checks and certain other information. Clearly, Rule 1006 of the Federal Rule of Evidence permits the introduction of summaries in situations where the contents of writings, recordings or photographs are so voluminous so as not to be conveniently examined in court. While the evidence was unquestionably of nature that a summary chart was appropriate, petitioner would contend that certain items included on the chart went beyond the guideline of Rule 1006 and were of such a nature that the traditional and historical function of the jury was usurped. Specifically, the summary included indication not only as to the contents of the checks but also included summaries of the testimony of various witnesses with all such indications being summarized in a manner most favorable to the government. It has been the juries function throughout the existence of our judicial system to consider the testimony of witnesses and to

decide based upon various considerations whether or not to accept the testimony as valid and the weight to be given thereto. Throughout the history of the jury, the Federal System has never permitted jurors to sit with pencil and paper and take notes as to the testimony of each witness and petitioner would contend that to allow summary charts of the type permitted in the case at hand would to allow the government to provide the notes to the jury, that the jury could not take itself.

Wherefore, petitioner respectfully contends that the question regarding the admissibility of summary charts containing a summary of the testimony of witnesses is of such importance that this Petition of Writ of Certiorari should be granted.

CONCLUSION.

For the foregoing reasons petitioners respectfully request that a Writ of Certiorari be granted directed to the Court of Appeals for the Third Circuit for review of the instant decision.

Louis H. Ceraso
Thomas R. Ceraso,
Attorney for Petitioner

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

79-1480

UNITED STATES OF AMERICA

v.

JULIUS VARGO,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
Crim. No. 78-00202

Argued October 10, 1979

Before: ADAMS, ROSENN and WEIS, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, namely, that (1) the evidence is insufficient to support the appellant's convictions in that it does not show that there was a scheme or artifice, that there was the use of the mails to defraud, or that there was any connection or any violation relative to the Comprehensive Employment and Training Act of 1973, or that in any way or manner any harm was perpetrated upon any person or the City of Jeannette; (2) the district judge erred in not granting defendant's motion for a mistrial based on prejudicial evidence; and (3)

the trial judge committed prejudicial error in permitting Exhibit No. 183 to be introduced into evidence, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Arlin M. Adams,
Circuit Judge

Dated: October 18, 1979

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. _____

UNITED STATES OF AMERICA

v.

JULIUS VARGO,

Appellant

Sur Petition For Rehearing
En Banc

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Arlin M. Adams,
Circuit Judge

Dated: November 16, 1979

Supreme Court, U.S.
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OCTOBER TERM, 1979

JULIUS VARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-937

JULIUS VARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his mail fraud convictions and that a summary chart was improperly admitted into evidence.

1. After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, and two counts of embezzling manpower funds, in violation of 18 U.S.C. 665. He was sentenced to five years' imprisonment on each of the mail fraud counts and two years' imprisonment on each of the embezzlement counts, the sentences to run concurrently. The court of appeals affirmed by judgment order (Pet. App. A).

The evidence showed that as City Clerk of Jeannette, Pennsylvania, petitioner was responsible for collecting certain money owed to the city. Relying on this authority, he requested the Westmoreland Casualty Company to mail workmen's compensation checks directly to him, rather than to the injured employees as had been the prior practice (Tr. 60-62).[1] The checks were sent to him as requested (Tr. 73-78). Some employees endorsed the checks over to the city at petitioner's request (Tr. 912-919, 961-965); the endorsements on others were forged (Tr. 803-810, 944-951). Instead of reporting his receipt of the checks to the City Treasurer as he was required to do (Tr. 647-652), petitioner reported them as though they were garbage service payments, which he was also authorized to collect (Tr. 208). He then appropriated cash from the garbage services receipts in an amount equal to the incorrectly reported checks (Tr. 1130-1177). When members of his office became suspicious that money was being diverted, they began initialling the checks that they processed, and endorsing them with a stamp that they locked up after working hours.[2] Petitioner thereupon forged the initials of his clerks and used a counterfeit stamp on the diverted checks (Tr. 228-265; Gov't Exh. 183). An audit conducted by the FBI showed that from January 1969 to November 1974, 102 insurance, CETA, and snow removal checks that had been mailed to petitioner had not been correctly reported. The checks totalled more than $31,000 (Gov't Exh. 183).

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[1]Although the checks were made payable to the employees, the city was entitled to the money because the employees were paid their full salaries during their absences (Tr. 445-446).

[2]Although the office staff received payments made in person, petitioner himself received and distributed the mail (Tr. 153-158, 210-211, 394, 561-570).

2. Petitioner contends (Pet. 5-6) that there was not a sufficiently close nexus between the mailings and his fraudulent scheme to bring his conduct within the reach of the federal mail fraud statute, 18 U.S.C. 1341.[3] The evidence refutes this claim. Petitioner's receipt of the checks through the mail clearly facilitated the operation of his scheme to divert them, because it permitted him to obtain possession of the checks before they entered the normal office routine. Thus, this is not a case in which the mailings played no significant part in the scheme to defraud, as in *United States* v. *Maze*, 414 U.S. 395 (1974), upon which petitioner relies. Rather, as in *Pereira* v. *United States*, 347 U.S. 1, 8 (1954), the mailings were "incident to an essential part of the scheme."

Petitioner asserts that the mailings did not fall within Section 1341's proscriptions because they were of a routine business nature. But the evidence showed that petitioner persuaded the insurer to alter its business routine by mailing the checks to him, rather than directly to the injured employee. In any event, a routine business mailing may be the basis for a mail fraud prosecution where, as here, the mailing is integral to the fraudulent

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[3]18 U.S.C. 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

scheme. See *Pereira* v. *United States*, *supra*; *United States* v. *Brown*, 583 F. 2d 659, 667-668 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979); *United States* v. *Foshee*, 569 F. 2d 401 (5th Cir. 1978).

3. Petitioner also contends (Pet. 6-7) that a summary chart (Gov't Exh. 183) prepared by an FBI accountant was improperly admitted into evidence. The chart consisted of a list of the checks that petitioner substituted for the cash he misappropriated, including their amount; their dates of issue and presentment; the name of the payor and payee; whether petitioner had reported the check; whether the payee's endorsement, the endorsement stamp, and the assistant clerk's initials were genuine; whether the amount of the check corresponded to amounts on other exhibits introduced; and whether the check contained fingerprints of some known individual (see Tr. 1068-1083). Petitioner concedes (Pet. 6) that the chart was admissible under Fed. R. Evid. 1006, insofar as it listed each check and represented its physical content.[4] He objects, however, to the chart's representation of testimony already before the jury.

The admissibility of a summary chart is within the sound discretion of the trial court. *United States* v. *Goodwin*, 470 F. 2d 893, 898-899 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973); *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943). Here, the district court, after examining the chart and requiring certain changes in the characterization of the information summarized (Tr. 1054-1059), admitted it not as independent evidence, but to aid the jury in the difficult task of correlating each check with the testimony that related to it (Tr.

[4]Rule 1006 provides for the admissibility of summaries or charts of "voluminous writings, recordings, or photographs which cannot conveniently be examined in court * * *."

1053-1054). The jury was reminded that it was required to exercise its untrammeled judgment upon the worth of that testimony. Thus, the court instructed the jury when the chart was admitted that "[w]hether or not something is true or false * * * is a conclusion solely for the jury, and we ask that the exhibit and the testimony of the agent be confined to what facts he found with respect to these, and you will pay attention to any findings of fact and compare them to the documentary evidence and what you have heard and determine for yourselves whether or not these are established as fact" (Tr. 1065). Moreover, petitioner does not show that the chart distorted the testimony or otherwise prejudiced him in any way; the person who prepared the chart testified and was subjected to extensive cross-examination (Tr. 1076, 1216-1265, 1275-1329). Under these circumstances, the court did not abuse its discretion in admitting the chart. See *United States* v. *Johnson*, *supra*, 319 U.S. at 519; *Gordon* v. *United States*, 438 F. 2d 858, 876-877 (5th Cir.), cert. denied, 404 U.S. 828 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

DOJ-1980-02